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ALEXANDER L. GILMAN

No. \_\_\_\_\_

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IN THE

**Supreme Court of the United States**

October Term, 1982

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AMERICAN GERI-CARE INC.,

*Petitioner,*

-against-

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1) Whether the National Labor Relations Act permits the burden of proof to shift from the NLRB's General Counsel to the Respondent/Employer in a case alleging discharge for Union activity where the Statute, Rules and Regulations of the National Labor Relations Board, Administrative Procedure Act and, various Circuit Courts of Appeal all do not permit such a shift in the burden of proof?

2) Whether a) an NLRB finding that the asserted justification for a discharge was "pretextual" is subject to "plenary review" as an issue of "ultimate fact" or to a standard of "substantial evidence", b) if Courts should engage in either form of review can a finding of "pretext"

stand where the NLRB analyzes the case as a "dual motive" one, cites its "dual motive" case holding as the basis for its finding of "pretext", and has in the past labeled discharges as "pretextual" where Courts have found a "dual motive" analysis appropriate?

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OPINIONS BELOW

The opinion of the United States Court of Appeals below, Docket No. 82-4053, is reported at \_\_\_F2 \_\_\_96 LC#13,966. It is appended hereto as Appendix A. That opinion enforced an Order of the National Labor Relations Board (hereinafter "NLRB".)

The opinion of the National Labor Relations Board below is reported at 258 NLRB 1116(1981). Said Order adopted the findings of the Board's Administrative Law Judge (hereinafter "ALJ".) Both opinions are appended hereto as Appendix B.

JURISDICTION

The Order sought to be reviewed was made December 23, 1982. A timely petition for rehearing was denied on January 21, 1983. The United States Court of Appeals, on February 16, 1983, granted a stay of its mandate pending review in this Court. The statutory provision

believed to confer on this Court jurisdiction to review the Order in question is 28 USC §1254(1).

STATUTES, RULES INVOLVED

§10(c) of the National Labor Relations Act, 29 USC §160(c) provides that the Board must dismiss a complaint when "upon the preponderance of the testimony taken" the Board "shall not be of the opinion" that an Unfair Labor Practice was committed.

§7(c) of the Administrative Procedure Act, 5 USC §556 states that "except as otherwise provided by Statute, the proponent of a rule or order has the burden of proof."

29 C.F.R. §101.10(b), the Board's own rules and regulations, provides that "the Board's attorney has the burden of proof of violations of §8 of the National Labor Relations Act."

STATEMENT OF THE CASE

American Geri-Care, Inc., the Respondent/Employer below, supplies personnel to healthcare facilities. These personnel include Registered Nurses (hereinafter "RNs"), Licensed Practical Nurses (hereinafter "LPNs") and aids, orderlies, kitchen aides, etc. RNs act as "charge" nurses on patient floors and direct the LPNs and aides on their floors.<sup>1</sup> RNs have substantial schooling, ie three years of college, before they earn RN status.

The Employer hired Shirley Annenburn, an RN, for service at its Aishel Avraham facility on July 13, 1979. On November 15, 1979, Mrs. Annenburn attended, but did not testify at, an NLRB "hearing" on the question of an election petition

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1/ No contention is made that such "charge" RNs are statutory supervisors.

filed by Local 144.<sup>2</sup> On November 16, 1979, Ms. Annenburn received a warning for lateness. On November 17, 1979, a request for leave, submitted to the Employer on that day, was denied because it fell during the "blackout" period for vacations at Christmas time. The NLRB, and the Court of Appeals in enforcing the Board's order, found these acts to be violative of the National Labor Relations Act.<sup>3</sup> On November 18, 1979, Annenburn called in "sick". She was off on November 19th. On November 20th she requested a half day "off". The request was denied because there was insufficient time to

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- 2/ No "hearing" actually took place because the parties entered into a stipulation for certification upon consent election. Accordingly the Employer was unaware of her sympathies.
- 3/ While the Employer has consistently argued that these findings were error, it recognized that these issues do not have national significance sufficient to warrant this Court's review. Accordingly the Petition for Certiorari does not address these issues.

replace her. Still on November 20th, Annenburn then asked for November 21st off. This request was also denied, for the same reason.<sup>4</sup>

Patient Dimant was a patient on the floor that Annenburn was in "charge" of. On November 20, Dimant became "critically ill", resulting in her being rushed to the hospital. Ms. Annenburn, however, had left the floor prior to the arrival of the ambulance and had given her "keys" for medications to LPN Hackshaw. Annenburn testified that she left the building because she became aware of her mother's illness. On the elevator down, Annenburn met Assistant Director of Nursing Palma. Annenburn testified that she was muttering to herself her displeasure at being denied

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<sup>4</sup>/ The ALJ, and the Board, found no violation in the Employee's denial of the requested time off.

the half days off that she requested. Indeed she was not sure if Palma ever found out that Annenburn's mother was ill during the elevator trip. Annenburn testified that Palma then gave her the day off. Palma testified that Annenburn mother was, according to Annenburn, "dying" and critically ill" and therefore she granted Annenburn permission to leave the building.<sup>5</sup>

Director of Nursing Milano called Annenburn that night and requested a certification that Annenburn's mother had been hospitalized. Annenburn told Milano that not only had her mother not been hospitalized, but that she had not seen a doctor. She explained that her mother's condition was "chronic" and required no doctor's care.

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5/ As noted heretofore Annenburn got this "permission" after she had already left the floor and had placed Hackshaw , an LPN, in charge.

In reviewing all the surrounding facts the Employer, on November 21, 1979, discharged both Annenburn and Assistant Director of Nursing Palma. The ALJ, citing the NLRB's decision in Wright Line, 251 NLRB 1083 (1980), found that "Respondent has not shown that the 'same action would have taken place even in the absence of the protected conduct.'"<sup>6</sup> The ALJ then labeled the motive for discharge as "mere pretext." The Board, in adopting the ALJ's findings, noted that "Because Respondent's asserted lawful reason for the discharge of Shirley Annenburn is pretextual...member Jenkins considers the

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6/ The Board, in Wright Line, announced its "new" test for "mixed motive" discharges. The analysis requires that the General Counsel establish a "prima facie" case and then shifts the burden to the Respondent to show that the same result would obtain even without the protected activity. The ALJ analyzed the instant proceeding in conformity with the Wright Line formula.

Administrative Law Judge's reliance on Wright Line... 251 NLRB 1083 to be unnecessary though it does not invalidate his conclusion."

The Court of Appeals, applying the "substantial evidence" test to the Board's finding of "pretext", believed it was unnecessary to deal with the Board's Wright Line formula because that was restricted to "mixed motive" discharges. It did not remand to the Administrative agency under SEC v. Cherney 318 US 80, despite its recognition of improper administrative reliance on Wright Line.

POINT I - THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE A) THIS COURT HAS GRANTED SUCH A WRIT IN A CASE OF THE SAME ISSUE B) THERE IS A SUBSTANTIAL SPLIT IN THE CIRCUIT COURTS OF APPEAL ON THE BOARD'S SHIFTING BURDEN STANDARD

This Court has recently determined that it will grant review on the issue of the appropriateness of the Board's doctrine enunciated in Wright Line. (NLRB v. Transportation Management Corp., 674 F2d 130 (1st Circuit), cert granted, 51 USLW 3378 (U.S. November 16, 1982).)

Assuming, as we must, that this is a "mixed motive" case it should be noted that the Board's Wright Line standard has been rejected by the First, Second, Third and Fifth Circuit Courts of Appeal.

(Behring Int'l v. N.L.R.B., 675 F2d 83,88 (3d Cir. 1982), TRW v. N.L.R.B., 654 F2d 307, 310 (5th Cir. 1981), N.L.R.B. v. Wright Line, 662 F2d 899 (1st Cir., 1981) cert denied 50 USLW 3695) and N.L.R.B. v. N.Y.U. Medical Center \_\_\_F2d\_\_\_, 96 LC

¶13995, (Docket #82-4137) (2nd Cir. 1/21/83.) Sec. 10(c) of the National Labor Relations Act states:

If upon the preponderance of the testimony taken the Board shall be of the opinion that the person named in the complaint has not engaged in...such Unfair Labor Practice, the Board...shall issue an order dismissing the Complaint (emphasis added.)

The Board's own regulations provide that "the Board's attorney has the burden of proof of violations of §8 of the National Labor Relations Act" 29 C.F.R. ¶101.10(b) (1981). Furthermore the Administrative Procedure Act 5 USC ¶556(d) (1976), states that

except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

The Board, however, in its Wright Line decision, requires the Respondent, after General Counsel has put in a "prima facie" case, to "demonstrate" that the same action would have taken place even in the

absence of protected conduct.

By "demonstrate" the Board means that the burden of persuasion shifts to the employer...consistent with this, the Board "views the employer's asserted justification as an affirmative defense." Id. at 1084 N.5, 1088 N.11 (Behring Int'l v. N.L.R.B., *supra*, see also N.L.R.B. v. N.Y.U Medical Center, *supra*, at Footnote 9.)

This "shifting" burden, however, runs counter to the above mentioned statutes and regulations. As a result the Courts have resoundly rejected this approach. The shifting burden is evident in the A.L.J.'s statement that "Respondent has not shown that 'the same action would have taken place even in the absence of protected conduct.'" This is not the Respondent's burden, however. In concluding "that the Board's...procedural aspect is wrong because it runs afoul of statutory provisions on the burden of proof" therefore requiring a remand, the Third Circuit held;

The Board must determine that the employee would not have been discharged but for his protected union activity. No violation exists if the employer would have made the same decision to discharge the employee in any event, absent the shielded conduct...no violation can be found unless... the General Counsel has proved by a preponderance of the evidence that the employer's anti-union animus was the real cause of the discharge (Behring Int'l v. N.L.R.B., supra.)

In N.L.R.B. v. Transportation Management Corp., supra, where the Board

based its finding of a violation upon a conclusion that the company "failed to meet its burden of overcoming the General Counsel's prima facie case by establishing by competent evidence that Santillo would have been discharged even absent his union activities (emphasis added.)

the First Circuit denied enforcement of the Board's order. Almost identical language appears in the instant proceeding. (See ALJ's decision, Pl2, L44-5.)

If the discharge would have taken place irrespective of anti-union motive no Unfair Labor Practice took place (NLRB v. Wright Line, supra.)

Herein, there is no proof, that no discharge would have taken place "but for" the protected activity. In fact, Ms. Palma, an admitted non-union supervisor, was discharged over the very same incident.

Finally, as the Courts of Appeal have noted, the proper allocation of burdens is not within the Board's "special competence" but rather is left to statutory interpretation of the Courts (NLRB v. N.Y.U. Medical Center, supra, see also NLRB v. Hearst Publications, 322 US 111, 130-31 (1944); NLRB v. Bell Aerospace Co. 416 US 267, 289 (1974); NLRB v. Highland Park Manufacturing Co., 341 US 322, 325-326 (1951.)) The foregoing is especially true where the "contested interpretation implicates an explicit provision in the governing statute." (NLRB v. N.Y.U. Medical Center, supra.)

Herein there was an improper shift in the burden of proof and the Board's order must be reversed.

POINT II - A) THE COURT BELOW IMPROPERLY LIMITED ITS REVIEW OF THE "PRETEXT" ISSUE BY APPLYING THE "SUBSTANTIAL EVIDENCE" TEST B) WHEN THE PROPER STANDARD OF REVIEW IS APPLIED THE CASE IS CLEARLY A MIXED MOTIVE ONE.

A. The Court below improperly limited review of the pretext issue.

It is respectfully submitted that the standard of review utilized by the Court was inappropriate in the instant proceeding. The Court felt itself bound by the "substantial evidence" rule in determining whether to adopt the Board's position that this case was a "pretext" one rather than a "dual motive" one. (See Page 14, first sentence of the Court's opinion.) This standard of review impermissably restricts the Court's right to determine whether the case is one as

characterized by the Board or not. As the Court held in T.R.W. v. N.L.R.B., 654 F2d 307;

"the mere characterization of an Employer's action as pretextual does not satisfy the responsibility of fully weighing all reasonable basis for that action. Whether an action is truly pretextual is a finding of fact but it is a finding of ultimate fact which is subject to our plenary review."

It is respectfully submitted, therefore, that the Court may have improperly limited its scope of review in the instant proceeding. The foregoing has dramatic prejudicial impact upon the Respondent. A comparison between the instant proceeding and that before the United States Supreme Court in N.L.R.B. v. Transportation Management Corp., supra illustrates this point. To assist the Court we have divided the cases and have compared the terminology used in each. (In contrast to the instant proceeding, a

finding of "pretext" in N.L.R.B. v. Trans. Mgt., is enhanced because the Respondent stated that he would "get even" "remember" and take "personal" the employee's Union activity.)

NLRB v. Trans. Mgt. Corp.      NLRB v American Gericare

1) The grounds for discharge therein were "purely pretextual", (See ALJ's and NLRB's opinions.)

1) The grounds supporting the discharge were "mere pretext" or "clearly pretextual."

2) The company "failed to meet its burden of overcoming the General Counsel's prima facie case by establishing by competent evidence that Santillo would have been discharged even absent his Union activities." (See NLRB and Court opinions.)

2) The "Respondent" has not shown that the same action would have taken place even in the absence of protected conduct."

3) Citation, and analysis, of Wright Line.

3) Citation, and analysis of Wright Line.

It is self-evident that the First Circuit, held the NLRB v. Transportation Management case to have been a "dual motive" case despite the Board's pro-

nouncements of "pretext". It is respectfully submitted that the Court should not permit the mere "characterization" of the Board to be subjected to a narrow scope of review of "substantial evidence" but should engage in plenary review, especially when it is evident that labels without significance are being used interchangeably in order to defeat Court review.

- B. When proper review standards exist, the case can only be classified as a "mixed motive" one.

The Administrative Law Judge's [Pl2, L38] analyzes this matter in a clearly "mixed motive" context. His use of the word "pretext", is more the product of nomenclature than legal significance. A review of his analysis, however, is one that the Board enunciated in Wright Line, 241 NLRB No. 150. Indeed he cites Wright Line in his analysis, he then states "Respondent has not shown that the same

action would have taken place even in the absence of the protected conduct."

(emphasis added)

One member of the Board siezes upon the incongruousness of relying on Wright line and asserting that the discipline was a "pretext" (see footnote #2 of Board's decision.)

In the words of the Court in Behring International Inc. v. NLRB, supra,

we recognize that there is a distinction between "pretext" and "dual motive" cases. In Lippincott Industries Inc. v. N.L.R.B., 661 F2d 112, 114 (9th Cir. 1981), however, the Court observed that 'in terms of the proper legal standard to be applied, the difference between these two types of cases is of little importance" (see footnote 3 thereof.)

The Board cannot simply label a discharge "pretextual" and proceed, at the same time, to analyze the case as a dual motive one so as to avoid attack on its "dual motive" holdings. As in the

instant proceeding,

The ALJ found Miranda's suspension to be pretextual... The ALJ then proceeded to analyze the case as a dual motive case...The Board changed this finding of the ALJ', concluding that Garza's discharge was "pretextual" (TRW v. NLRB, supra).

In TRW the Board's attempt, by its change of labels, to gain enforcement of its order was rejected. The identical situation exists herein. The ALJ, by his citations and analysis, delves into the discharge issue as a "mixed motive". The Board then finds the discharge "pre - textual." The Court then, applying a limited scope of review, enforces this "finding."

Since the Court considers

In assessing the substantiality of the evidence, however, not only those facts that support the Board's decision, but also those that militate against it ...the mere characterization of an employee's action as pretextual does not satisfy

the responsibility of fully weighing all reasonable bases for that action. Whether an action is truly pretextual is a finding of fact, but it is a finding of ultimate fact which is subject to our plenary review. Indeed where there were no facts establishing that the motivating cause for

the employer's action was anti-union prejudice and where such

facts could only be inferred ...we have observed, an unlawful purpose is not to be lightly inferred...Suspicion, conjecture and theoretical speculation register no weight on the substantial evidence scale.

(TRW v. NLRB, supra.)

In order to make a finding of "pretext" the Board, and Court, must find that the Employer's justification was not a factor in the discharge, at all. In effect they must find that the Employer's assertion is a "sham." Significantly, the Court below does not address the critical fact that Assistant Director

Palma was discharged over the very same incident as was Annenburn. Can it truly be said that the Employer had no incident occur on November 21st? Can it really be contended that the Employer, in no manner, "relied" upon the incident of November 21st in his action with regard to Annenburn and Palma?<sup>7</sup>

Contrary to the lower Court, the parties did not "concede that during the entire Dimant incident at least one additional Registered Nurse and one Licensed Practical Nurse were present to assist Mrs. Dimant." Not only did the Respondent not concede this fact but he vigorously contested this issue.

Furthermore, even if the Home had such coverage, as a fortuitous event, it does

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<sup>7/</sup> The foregoing questions must be answered negatively in order to support a true "pretext" theory of the case.

not excuse a hasty departure of a "charge" nurse for nebulous reasons during her tour of duty.

Moreover, the evidence is unmistakable that Ms. Palma gave her permission to Annenburn to leave the facility because she was told, by Annenburn, that Annenburn's mother was "dying" (Joint Appendix Page 261) and was "critically ill." When viewed in this light, and all the surrounding circumstances, ie the earlier requests for a half day off, it is hardly surprising that Ms. Milano asked for verification of this illness. Finally, any purported "permission" granted would be fraudulently obtained if the basis for it were untrue, ie, if Annenburn's mother was not "dying" or "critically ill."

It is evident that something occurred on November 20, 1979. Action was taken in reliance on those occurrences. If the standard of proof used by the Board was

incorrect, reversal is appropriate. If reliance was made by an administrative agency on a holding that should not have been relied on, ie Wright Line in a "pretext" case, remand is necessary.<sup>8</sup> (S.E.C. v. Cherney, 318 US 80). The failure to do either requires reversal.

#### CONCLUSION

This Court has granted Certiorari, on November 16, 1982, to a case raising the same issues as the instant petition. Clearly, the issue is therefore worthy of this Court's review. Furthermore, there is a substantial split in the Circuit Courts of Appeal on the issue.<sup>9</sup>

Upon granting Certiorari, this Court should reverse the decision of the Court below.

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8/ The Court of Appeals recognized that the Board's reliance on Wright Line, while finding a "pretext", implicates the SEC v. Cherney doctrine.

Respectfully Submitted,

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9/ Courts that have adopted the shift of burden of persuasion announced in Wright Line are Justak v. NLRB, 664 F2d 1074, 1077 (7th Cir 1981); NLRB v. Nevis Industries Inc. 647 F2d 905, 909 (9th Cir. 1981.)

APPENDIX

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 180—August Term, 1982

(Argued September 24, 1982

Decided December 23, 1982)

Docket No. 82-4053

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

—v.—

AMERICAN GERI-CARE, INC.,

*Respondent.*

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**B e f o r e :**

FRIENDLY, MESKILL and CARDAMONE,

*Circuit Judges.*

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Petition for enforcement of an order of the National Labor Relations Board citing an employer for violations of Sections 8(a)(1), (3) and (4) of the National Labor

Relations Act for harassing and discharging an employee and for promising increased wages to induce anti-union votes. The Court finds substantial evidence to support the Board's findings and orders enforcement.



JONATHAN SAPERSTEIN, National Labor Relations Board, Washington, D.C. (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C., of counsel), *for Petitioner.*

MORRIS TUCHMAN, New York, New York (Gluck & Tuchman, New York, New York, of counsel), *for Respondent.*



MESKILL, *Circuit Judge:*

The petitioner, National Labor Relations Board (Board), has submitted an application pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1976) (NLRA), for enforcement of its September 30, 1980 order against the respondent, American Geri-Care, Inc. (the Company). Jurisdiction is properly conferred on this Court by Section 10(e) of the Act because the Board seeks enforcement of a final order in which the Company was found guilty of several unfair

labor practices. We conclude that the Board's findings were supported by substantial evidence and therefore order that the decision of the NLRB be enforced under the terms outlined in the administrative decision.

### *Background*

American Geri-Care is a New York corporation principally engaged in the business of providing health care, staffing and related services to various medical institutions in the greater New York City area.<sup>1</sup> The Company derives substantial revenue by contracting to staff local nursing homes from its pool of registered nurses and related medical personnel. Under one such contract, the Company agreed to provide the Aischel Avraham Nursing Home in Brooklyn with thirteen registered nurses to service that institution during the 1979 fiscal year. The events giving rise to the Board's unfair labor practice findings each occurred at the Avraham facility.

The group of nurses assigned to the Avraham Home did not belong to a union when they commenced working at that institution. They were subsequently approached, however, by two rival unions who sought to enlist their support for unionization. On October 29, 1979, one of these unions, Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO (Local 144), filed a representation petition on behalf of the unit of registered nurses employed by the Company at the Avraham facility. The rival union, Local 6, International Federation of Health Professionals, International Longshoreman's Association, AFL-CIO (Local 6), requested

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<sup>1</sup> Respondent concedes that it is engaged in commerce within the meaning of § 2(6) and (7) of the Act, 29 U.S.C. § 152(6), (7) (1976), and is therefore amenable to the jurisdiction of the NLRB.

and was granted permission by the NLRB to participate in the union election. A closed ballot election was held on December 20, 1979, and Local 144 was narrowly defeated.<sup>2</sup>

On December 28, 1979, Local 144 filed timely objections to conduct affecting the results of the election. Local 144 principally alleged that the Company had engaged in a broad range of unfair labor practices in an effort to defeat the union's election bid. The union requested that an administrative hearing be held to consider these charges and, for purposes of this appeal, two important rulings were made at that hearing. The Administrative Law Judge (ALJ) found that: (1) the Company had violated Sections 8(a)(1), (3) and (4) of the NLRA, 29 U.S.C. § 158(a)(1), (3), (4), by harassing, discharging and failing to reinstate Shirley Anenburn because she had engaged in protected labor activity; and (2) the Company had violated Section 8(a)(1) of the NLRA by promising and granting its employees special benefits to induce them to vote against unionization.<sup>3</sup>

The ALJ subsequently ordered that Shirley Anenburn be reinstated, with full back pay and seniority, to her former position as a registered nurse at the Avraham facility. He also ruled that a new election be held because the prior voting had been tainted by the Company's illegal promise of special benefits. *In the Matter of*

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<sup>2</sup> Of the approximately thirteen nurses who were eligible to vote in this election, five voted against the participating unions, three voted for Local 144, and no one voted for Local 6. One additional person voted, but her vote was successfully challenged and thus was not included in the final tally. See J. App. at 9.

<sup>3</sup> The union raised additional unfair labor practice claims in the administrative proceeding, but these claims were rejected by the ALJ and the union has not sought review. See J. App. at 12-13.

*American Geri-Care*, NLRB, JD-(NY)-57-81 (June 15, 1981), *reprinted in* J. App. at 8. The Board affirmed the ALJ's findings and rulings. *American Geri-Care, Inc.*, 258 N.L.R.B. 1116 (1981).

## *Discussion*

### *A. Anenburn Incident*

Shirley Anenburn was employed by the Company during most of 1979 as a registered nurse at the Avraham facility.<sup>4</sup> Anenburn actively supported Local 144 during the pre-election campaign. She signed an authorization card, collected cards from other nurses, and attended an organizational meeting sponsored by the union. Anenburn was subpoenaed to appear as a witness on behalf of Local 144 at an NLRB representation hearing that was held on November 15, 1979.<sup>5</sup> The parties concede that the Company was aware of Ms. Anenburn's pro-union sympathies.

Management's treatment of Ms. Anenburn took a decided turn after she appeared at the Board hearing on behalf of Local 144. On November 16, 1979, one day after she attended the representation hearing, the Company issued a warning notice to Anenburn citing her for tardiness. On the following day, November 17, 1979, management denied Anenburn's request for vacation

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<sup>4</sup> The Company initially argued that Anenburn, as charge nurse for the third floor, was a "supervisor" within the meaning of § 2(ii) of the Act, 29 U.S.C. § 152(ii) (1976), and therefore was not a protected employee under the Act. The ALJ rejected this argument and the Company concedes on appeal that Anenburn was not a "supervisor." See *Meharry Medical College*, 219 N.L.R.B. 488, 490 (1975); *Wing Memorial Hospital Ass'n*, 217 N.L.R.B. 1015 (1975).

<sup>5</sup> Although Ms. Anenburn did not testify at the Board hearing, management was aware that she was present at the request of Local 144. See J. App. at 61-64.

leave even though she had been assured verbally that her application would be granted. Finally, Ms. Anenburn was discharged on November 21, 1979, purportedly because she abandoned a dying patient while on duty.

At the conclusion of the administrative proceedings, the ALJ reviewed these incidents and found that the Company took action against Ms. Anenburn not for prudent business reasons, but rather principally in retaliation for her support of Local 144. He cited American Geri-Care for violations of Sections 8(a)(1), (3) and (4) of the Act.

Sections 8(a)(1), (3) and (4) of the National Labor Relations Act provide in pertinent part that it shall be an unfair labor practice for an employer:

- (1) to interfere with, restrain, or coerce employees in the exercise of [their Section 7 rights];<sup>6</sup>
- . . . .
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; [and]
- (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

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<sup>6</sup> Section 7 of the Act, 29 U.S.C. § 157 (1973), provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Codified as amended at 29 U.S.C. § 158(a)(1), (3) and (4) (1976).

Actions commenced under these provisions often raise difficult issues of fact, including the critical question of employer motivation for undertaking the acts complained of. Management typically argues, for example, that its decision to issue an employee warning notice was guided by prudent business judgment. The General Counsel and the aggrieved employee generally respond that the employer was motivated principally by anti-union animus when issuing the disputed citation and that the "business judgment" explanation is merely a pretense or sham.

The NLRA vests primary responsibility in the National Labor Relations Board to resolve these difficult questions of fact. *See* 29 U.S.C. § 160(e) (1976). The Board is empowered to review the evidence presented in the administrative proceeding, to assess the credibility of witnesses, and ultimately to decide whether the claims of the employer or the employee are more persuasive. The Court's scope of review on petition for enforcement of an NLRB order is properly quite limited. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976). The Court will affirm the factfindings of the Board if there is "substantial evidence on the record considered as a whole, taking into account whatever in the record fairly detracts from its weight, but giving due regard to the Board's expertise." *NLRB v. International Metal Specialties, Inc.*, 433 F.2d 870, 871 (2d Cir. 1970), *cert. denied*, 402 U.S. 907 (1971); *see United Aircraft Corp. v. NLRB*, 440 F.2d 85, 91 (2d Cir. 1971).

We have also noted that the findings of the Board "cannot lightly be overturned," *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (2d Cir. 1973),

citing *United Aircraft Corp. v. NLRB*, 440 F.2d 85, 91 (2d Cir. 1971), and *NLRB v. Gladding Keystone Corp.*, 435 F.2d 129, 132 (2d Cir. 1970), especially when these findings are based upon the Board's assessment of witness credibility. See *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952). Indeed, credibility findings made by the ALJ and accepted by the Board will not be overturned unless they are "hopelessly incredible" or they "flatly contradict" either the "law of nature" or "undisputed documentary testimony." *NLRB v. Columbia University*, 541 F.2d at 928; *NLRB v. Dinion Coil Co.*, 201 F.2d at 490.

### 1. *The Warning*

On November 16, 1979, one day after she appeared at the representation hearing, the Company issued a written warning notice to Anenburn. She was cited for arriving late to work on various dates between September 22, 1979 and November 3, 1979. See J. App. at 329. Anenburn testified at the NLRB hearing that she had received oral permission to arrive late on the days cited in the warning. She also stated that the Company had never before issued a warning to her and further that management had complimented her on several occasions for her exemplary work.

The ALJ found that Ms. Anenburn had testified credibly when relating the events that precipitated her warning notice. He also noted that Anenburn had never previously been cited for tardiness. The ALJ found the timing of the Company's decision to issue a warning notice to be especially troubling. He questioned why management would have waited until one day after Ms. Anenburn had appeared at a Board representation hearing to cite her for

instances of tardiness that occurred in most cases one month prior to the citation.<sup>7</sup>

There is substantial evidence to support the ALJ's finding here, as adopted by the Board. See *Universal Camera Corp. v. NLRB*, 340 U.S. at 488; *United Aircraft Corp. v. NLRB*, 440 F.2d at 91. Nothing in the record suggests that Ms. Anenburn's testimony was hopelessly incredible or that it flatly contradicted the laws of nature. *NLRB v. Columbia University*, 541 F.2d at 928. The ALJ also properly considered the timing of management's decision to issue the disputed warning. An inference of anti-union animus is proper when the timing of the employer's actions is "stunningly obvious." *NLRB v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (2d Cir. 1972) (quoting *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970)); see *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 465 (2d Cir. 1973) (timing and abruptness of discharge are persuasive evidence of motivation). The Company did not explain persuasively the reasons why it chose to wait until November 16, 1979 to issue the warning notice, see *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d 928, 932 (2d Cir. 1980); *NLRB v. Styletek*, 520 F.2d 275 (1st Cir. 1975), and did not convincingly discredit Anenburn's testimony. The evidentiary record supports the findings of the ALJ on this issue.

## 2. Denial of Vacation Leave

On October 19, 1979 Ms. Anenburn requested two weeks vacation leave, to commence on December 29,

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<sup>7</sup> The citation was issued on November 16, 1979. Most of the dates included in the citation for tardiness were early in October of 1979. See J. App. at 329-31.

1979. She planned to be married during that vacation and had expected to use the remainder of her leave to take a honeymoon. Anenburn testified that Ms. June Stuart, the In-Service Instructor, had orally assured her that the vacation request would be granted. Further testimony revealed that Director Milano, the Company's most senior representative at the Avraham facility, knew as early as November 7, 1979 that Anenburn expected to be married during her December vacation. In fact, Juanita Palma, the Assistant Director of Nursing at the Avraham Home, testified at the administrative proceeding that Director Milano stated to her: "She said she was not going to give her [Anenburn] the time off and she wants her out." See J. App. at 12.

Anenburn's request for vacation leave was denied on November 17, 1979, one day after she was issued the warning notice and two days after she had appeared at the representation hearing before the Board. The ALJ found that management's refusal to grant Anenburn's request for vacation leave constituted "another step in the harassment of Anenburn for her union related activities." *In re American Geri-Care, Inc.*, NLRB, JD-(N.Y.)-57-81, at 5 (June 15, 1981), *reprinted in* J. App. at 1, 12. The judge cited the Company for violations of Sections 8(a)(1) and (4) of the Act.

Once again, the ALJ's findings were principally based upon determinations of witness credibility. The ALJ credited the testimony of Ms. Palma and Ms. Anenburn and noted that the Company had not persuasively explained why it had waited for more than one month to deny Anenburn's request. These credibility findings accepted by the Board are not hopelessly incredible or irrational. See *NLRB v. Columbia University*, 541 F.2d at 928; *NLRB v. Dinion Coil Co.*, 201 F.2d at 490. Moreover, the

Board properly could infer unlawful motivation from the stunningly obvious timing of management's decision to deny Anenburn's vacation request; see *NLRB v. Advanced Business Forms Corp.*, 474 F.2d at 465, see also *NLRB v. Long Island Airport Limousine Service Corp.*, 468 F.2d at 295, and from the Company's inability to explain persuasively why it decided to deny Ms. Anenburn's request two days after she had appeared at the Board representation hearing. See *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d at 932; *NLRB v. Styletek*, 520 F.2d at 278. Accordingly, we conclude that the ALJ's decision, as adopted by the Board, to cite the Company for violations of Sections 8(a)(1) and (4) is supported by substantial evidence.

### 3. Discharge of Anenburn

The events leading to the discharge of Ms. Anenburn occurred during the morning of November 20, 1979. Ms. Anenburn was working the 7:00 a.m.-3:30 p.m. shift on the third floor of the Avraham facility at that time. Shortly after commencing work on that day, Anenburn was informed that one of her patients, Mrs. Serena Dimant, was unable to breathe without serious difficulty. Anenburn promptly paged Assistant Director Palma to apprise her of the situation.

Palma explained that when she arrived in Mrs. Dimant's room, Anenburn was checking the patient's vital signs. Palma further testified that Anenburn administered oxygen to Mrs. Dimant and competently cared for the patient while she left to call for an ambulance. The parties concede that during the entire Dimant incident at least one additional registered nurse and one licensed practical nurse were present to assist Mrs. Dimant. Mrs. Dimant subsequently was taken by ambulance to the

hospital. She returned, fully recovered, to the Avraham facility the following day.

Ms. Anenburn was notified during the Dimant incident that her mother had called the Avraham Home and had indicated that she was not feeling well. Ms. Palma noticed later that morning that Anenburn was preoccupied with the state of her mother's health. Palma decided to give Anenburn permission to leave work early so that she might care for her mother. Director Milano conceded that management knew Anenburn had permission to leave work early. She also testified that Ms. Palma was fully authorized by the Company to grant such requests. In fact, Milano observed Anenburn leaving early on that date but did not attempt to ascertain the reasons for her departure.

Director Milano telephoned Anenburn later that evening and indicated to her that management would expect a doctor's note explaining why her mother's condition had required hospitalization. Anenburn stated to Milano that even though her mother was diabetic and hypertensive, her condition did not warrant hospitalization. She thus explained that it would be impossible to get a doctor's note.

Upon reporting to work the next morning, November 21, 1979, Anenburn noticed that her punch card was not in its usual place. She was instructed at that time to report to the nursing office. Anenburn subsequently met with Mr. Gary Stern<sup>8</sup> and Director Milano in the nursing office. Prior to commencing this interview, however, Anenburn requested that another employee be present

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<sup>8</sup> Mr. Stern served as Secretary of American Geri-Care during the period in question.

during the course of the meeting.<sup>9</sup> When Mr. Stern denied this request, Anenburn indicated that she would not meet with Stern and Milano alone. Stern promptly informed Anenburn: "So I told her under those circumstances she could take her coat and go home, she was terminated." See J. App. at 196. Anenburn was not given an official reason for her discharge at that time, nor did she receive an official termination notice. Mr. Stern did testify at the administrative proceeding, however, that Anenburn was terminated because "she abandoned a dying patient." See J. App. at 14.

The ALJ found the Company's asserted reason for discharging Anenburn to be "clearly pretextual." See J. App. at 14. He credited the testimony of Anenburn and Palma and noted that the statements of these witnesses were largely corroborated by the nursing supervisor at the Avraham facility, Mrs. Elsa Wilson.<sup>10</sup> The judge also found that the Company was aware that Anenburn had permission to leave early on November 20, 1979, and that the evidence offered at the administrative proceeding conclusively proved that Ms. Anenburn performed her duties professionally and competently during the Dimant incident. He concluded that:

I find that Annenburn [sic] gave proper care to the patient, Mrs. Dimant. She was then given permission by Palma, who had authority to give such permis-

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<sup>9</sup> Ms. Anenburn apparently was concerned that her version of the events that transpired during this meeting might be refuted by the two representatives of management and thus the only way to protect herself would be to have another employee present.

<sup>10</sup> Mrs. Wilson was Anenburn's supervisor during the disputed Dimant incident and since May of 1980 has served as Assistant Director of Nursing at the Avraham Nursing Home.

sion, to leave the Home. Milano and Stern knew that she was given that permission before they terminated her. I find that Annenburn's [sic] termination was a culmination of events which started with the giving of the warning notice and then the refusal to approve the request for leave. These actions were taken by Respondent because of Annenburn's [sic] activity on behalf of Local 144 and because of her appearance at the Board hearing on November 15.

*In re American Geri-Care, Inc.*, NLRB, JD-(NY)-57-81, at 8 (June 15, 1981), *reprinted in* J. App. at 1, 15. The ALJ cited American Geri-Care for violations of Sections 8(a)(1), (3) and (4) of the Act, based upon his findings of unlawful discharge. The Board subsequently adopted these findings.

There is substantial evidence to support the Board's ruling that American Geri-Care was motivated by anti-union animus, *not* sound business judgment, when discharging Shirley Anenburn. *See United Aircraft Corp. v. NLRB*, 440 F.2d at 91; *NLRB v. International Metal Specialties Inc.*, 433 F.2d at 871. Management has not offered any persuasive evidence to support its contention that Anenburn abandoned a dying patient. Indeed, the individuals who were present during the Dimant incident each testified at the NLRB proceeding that Anenburn performed her duties professionally and capably when administering to Ms. Dimant. The ALJ credited this testimony and management has been unable to show that the statements of Ms. Palma, Mrs. Wilson, or Ms. Anenburn were hopelessly incredible or irrational. *NLRB v. Columbia University*, 541 F.2d at 928; *NLRB v. Dinion Coil Co.*, 201 F.2d at 490. This is not a case where the employer has accumulated strong evidence of employee

neglect or incompetence,<sup>11</sup> or where there is substantial probative evidence both supporting and refuting charges of unlawful management motivation.<sup>12</sup> Rather, the evidence presented at the administrative proceeding revealed that Anenburn was a capable employee who was subjected to three acts of management harassment within the space of one week—the tardiness notice, the denial of vacation leave, and the discharge—precisely because she had engaged in protected union activity.

Counsel for management argues, however, that the ALJ erred when he applied the so-called *Wright Line* test to the facts of this case. In *Wright Line, A Division of Wright Line Inc.*, 251 N.L.R.B. 1083 (1980), *enf'd on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (U.S. Mar. 1, 1982), the Board announced that it would henceforth shift the burden of proof in dual-motive discharge cases. 251 N.L.R.B. at 1087–88. Under this approach, once the General Counsel has made a strong *prima facie* showing of unlawful motivation, the burden of proof shifts to the employer. To prevail, management must show that it would have taken the same action even if the employee had not engaged in protected labor activity. *Id.* The Board noted

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<sup>11</sup> See, e.g., *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292 (2d Cir. 1972), where this Court, even though conceding that the discharged employee was not an exemplary worker (truck driver with many speeding violations, frequent tardiness, and consistently failed to turn in daily cash receipts promptly), nonetheless held that management's discharge of this employee (union official) shortly before the union election raised the permissible inference that the discharge was motivated by anti-union animus. *Id.* at 296.

<sup>12</sup> See *NLRB v. Columbia University*, 541 F.2d 922 (2d Cir. 1976), where this Court, although acknowledging that the testimony on the question of unlawful motivation was conflicting, nonetheless held that it would not second-guess the findings of the ALJ, as adopted by the Board. *Id.* at 928.

in *Wright Line* that the burden shift contemplated by its decision had been applied by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), where a public employee alleged that a motivating factor in the non-renewal of his contract was his constitutionally protected activities.

Counsel for management concedes that the *Mt. Healthy* test may be proper in constitutional cases, but asserts that it is singularly inappropriate to apply this burden shift in discharge cases under the NLRA. Counsel correctly notes that there is a substantial division in the Circuits over the question of whether the Board may properly shift the burden of proof in discharge cases.<sup>13</sup>

This Court need not resolve the *Wright Line* issue in this appeal, however, because there is substantial evidence to support the Board's finding that management's explanation for Anenburn's discharge was clearly pretextual. The ALJ specifically noted at two points in his administrative decision that the Company's justification for terminating Anenburn, *i.e.*, for abandoning a dying patient, was mere pretext. *In re American Geri-Care, Inc.*, NLRB, JD-(NY)-57-81, at 7, 12 (June 15, 1981), *reprinted in J. App.* at 14, 19.

Once the finding of pretext is made, and is supported by substantial evidence in the enforcement proceeding, the adjudication is complete and neither the Board nor the Court need engage in the *Wright Line* analysis. *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 39 (2d Cir.

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<sup>13</sup> Compare cases rejecting *Wright Line* burden shift, *Behring Int'l, Inc. v. NLRB*, 675 F.2d 83, 88 (3d Cir. 1982); *Wright Line, A Division of Wright Line Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (U.S. Mar. 1, 1982); *TRW, Inc. v. NLRB*, 654 F.2d 307, 310 (5th Cir. 1981), with these cases that have adopted the shift, *Justak Bros. and Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981); *NLRB v. Nevis Indus., Inc.*, 647 F.2d 905, 909 (9th Cir. 1981).

1981).<sup>14</sup> In his concurring opinion in *Batchelder* Judge Newman has argued that the burden shift espoused in *Wright Line* cannot be applied in pretext cases and is appropriate, if at all, *only* in the second type of discharge case, the dual motive case. *Id.* at 43. Indeed, implicit in the finding of pretext is the judgment of the court that the employer has not marshalled any convincing evidence to support its position. Thus, any reference in this action to the *Wright Line* standard was unnecessary and does not detract from the Board's finding of pretext.

We are, of course, mindful of the Supreme Court's statement in *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." But the *Chenery* doctrine, as Professor Davis has rightly said, has been "softened in its application." 3 K. Davis, *Administrative Law Treatise* § 14.29, at 130 (2d ed. 1980). It does not mean that a reversal and remand are required each and every time an administrative agency assigns a wrong reason for its action; rather, it requires reversal and remand *only* where there is a significant chance that but for the error, the agency might have reached a different result. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 248 (1964); Friendly, *Chenery Revisited: Reflec-*

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<sup>14</sup> As a practical matter, the ALJ often will reach the *Wright Line* issue as an alternative basis for his unfair labor practice findings even though, as here, a finding of pretext is warranted by the evidence. Specifically, the ALJ typically will rule that even if the court does not find substantial evidence to support a pretext holding, there is substantial evidence in the dual motive case (implicating *Wright Line*) to support a finding that the Company would not have fired the discharged employee but for his union activities.

*tions On Reversal And Remand Of Administrative Orders*, 1969 Duke L.J. 199, 210-11. We are convinced in this case that even if we were to find the Board's *Wright Line* test to be inconsistent with the NLRA, reversal and remand would be an "idle and useless formality," *NLRB v. Wyman-Gordon Co.*, 394 U.S. at 766 n.6, because there is not the slightest doubt that the Board would simply reaffirm its order on the ground that the employer's reasons for discharging Anenburn were clearly pretextual.

Finally, it should be noted that even the First Circuit, which has most vigorously opposed the burden shift contemplated in *Wright Line*, routinely enforces orders that rely on the *Wright Line* analysis so long as the Board has also made a supportable finding of pretext. Where the Board's decision has not turned on "the niceties of burdens of proof," *NLRB v. Magnesium Casting Co.*, 668 F.2d 13, 16 (1st Cir. 1981), the First Circuit has concluded that no remand is necessary. See *NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 850 (1st Cir. 1982); *NLRB v. Wright Line*, 662 F.2d 899, 907 n.13 (1st Cir. 1981), cert. denied, 50 U.S.L.W. 3695 (U.S. Mar. 2, 1982).<sup>15</sup>

The Court orders that the decision of the Board on the discharge issue be enforced according to the terms outlined in the administrative opinion.

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<sup>15</sup> In *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982), this Circuit ruled that the burden shift contemplated in *Wright Line* is permissible under the Energy Reorganization Act, § 210, 42 U.S.C. § 5851 (Supp. II 1978). *Id.* at 62-63. We need not decide in this appeal whether the *Wright Line* burden shift is also permitted under the NLRA because the finding of pretext is a sufficient, independent ground to sustain the decision of the Board. We note that the Supreme Court has recently granted *certiorari* to resolve the *Wright Line* question in a NLRA case. See *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir.), cert. granted, 51 U.S.L.W. 3378 (U.S. Nov. 16, 1982).

### B. *Promise of Benefits*

Director Milano arranged a meeting with the nursing staff of the Avraham facility approximately ten days before the union election was scheduled to be held.<sup>16</sup> Milano urged the nurses who attended that meeting to vote for management and intimated that the Company would increase wages and benefits if it prevailed in the union election. The parties stipulated that the unions were unsuccessful in the December 20, 1979 election and further that the registered nurses at the Avraham facility received a wage increase and an additional week's vacation, effective January 1, 1980.

The ALJ found that the Company had violated Section 8(a)(1) of the Act by unlawfully promising benefits to its employees to induce them to vote against a particular union. He ordered that a new union election be held and that the Company cease and desist from promising and granting benefits to induce its employees to vote against the union. *In re American Geri-Care*, N.L.R.B. JD-(N.Y.)-57-81, at 15-16 (June 15, 1981), *reprinted in* J. App. at 22-23.

The court's scope of review in Section 8(a)(1) unlawful promise cases is circumscribed by the same general legal standards that apply in Section 8(a)(1) discharge cases. 29 U.S.C. § 160(e) and (f) (1976); *NLRB v. Charles Batchelder Co.*, 646 F.2d at 38; *see Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d 928, 932 (2d Cir. 1980). In both cases, the court's inquiry on petition for enforcement is limited. We must determine whether substantial evidence supports the findings of the ALJ, as adopted by the

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<sup>16</sup> The ALJ specifically found that this meeting took place approximately ten days to two weeks prior to the December 20, 1979 election. *See* J. App. at 18.

Board, and we must not “ ‘displace the Board’s choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.’ ” *NLRB v. Charles Batchelder Co.*, 646 F.2d at 38, quoting *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 405 (1962) (per curiam) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Nurse Charles was present at the December meeting and she testified that Director Milano intimated during this meeting that the nurses could expect increased wages and benefits if they voted against the union. The ALJ credited this testimony. He also noted that the timing of management’s decision to increase wages and benefits (January 1, 1980) raised an inference of unlawful conduct and that the Company had failed to rebut this inference. The ALJ indicated that Section 8(a)(1) could be violated, even if the promise of benefits was not expressly made contingent on voting against the union, where the timing of the offer indicated a coercive purpose and effect. *In re American Geri-Care, Inc.*, NLRB, JD-(N.Y.)-57-81, at 13 (July 15, 1981), *reprinted in J. App.* at 20.

There is substantial evidence to support these findings. Nurse Charles’ testimony was not incredible or irrational. Her recollection of the events that transpired at the December meeting reveals that the Company tacitly had represented that benefits and wages would be increased *only* if management prevailed in the December 20 election. The ALJ properly noted that the timing of the Company’s offer and granting of increased wages and benefits raised an inference of anti-union animus. *See Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d at 932. Management’s failure to rebut that inference persuasively raises serious questions about its sincerity and

good faith. *Id.*; *NLRB v. Styletek*, 520 F.2d 275, 279 (1st Cir. 1975).

The ALJ also correctly ruled that Section 8(a)(1) can be violated even though management does not expressly condition its promise of benefits on the outcome of a union election. In *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d 928 (2d Cir. 1980), this Court explained that promises by management, even if implicit or subtle, would violate Section 8(a)(1) if the timing of those offers indicated a coercive purpose and effect:

The promises and grant of a benefit (the wage and health plan offers) were not expressly made dependent upon the employees' rejection of the Union. Nevertheless, the timing of those offers indicated a coercive purpose and effect. *See, e.g., NLRB v. Colonial Knitting Corp.*, 464 F.2d 949 (3d Cir. 1972) (granting of wage increases on eve of certification election was coercive). The company failed, in the hearings before Judge Miller, to justify the timing of the offer of benefits, as it was called upon to do to avoid the inference of anti-union action. *See NLRB v. Styletek*, 520 F.2d 275 (1st Cir. 1975).

*Id.* at 932.

This Court found a coercive purpose and effect in *Grandee* when management announced on the eve of the union election that employee wages and health benefits would be increased. *Id.* The Court also found a coercive purpose and effect in *NLRB v. Charles Batchelder Co.*, 646 F.2d 33 (2d Cir. 1981), when management decided, in the midst of a union organizing drive and on the eve of the election, to implement a new wage increase two months earlier than originally scheduled. *Id.* at 41.

Management's timing in this action is equally troubling. Nurse Charles testified that Director Milano called a meeting shortly before the union election and indicated during this meeting that the Company would increase wages and benefits if management won the election. Both parties concede that the Company did in fact grant wage and benefit increases on January 1, 1980, ten days after the election. The ALJ certainly could infer from this sequence of events that management had promised benefits in an effort to induce its employees to vote against the union. See *NLRB v. Charles Batchelder Co.*, 646 F.2d at 38; *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d at 932.

There is substantial evidence to support the ALJ's finding, as adopted by the Board, that the Company violated Section 8(a)(1) of the Act when it promised and granted its employees wage and benefit increases. The Court will enforce these findings according to the terms outlined in the administrative opinion. A new election will be held at a date to be determined by the Regional Director of the Board.

UNITED STATES COURT OF APPEALS  
for the  
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of January, one thousand nine hundred and eighty-three  
Present:

HON. HENRY J. FRIENDLY

HON. THOMAS J. MESKILL

HON. RICHARD J. CARDAMONE

Circuit Judges,

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NATIONAL LABOR RELATIONS BOARD,  
No. 82-4053  
Petitioner,

v.

AMERICAN GERI-CARE, INC.,  
Respondent.

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A petitioner for a rehearing having  
been filed herein by counsel for the  
respondent, American Geri-Care, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and  
it hereby is DENIED.

A. Daniel Fusaro, Clerk

by /s/  
Francis X. Gindhart,

The following pages represent a  
retyping of a Notice of Motion, Docket  
#82-4053 for "Stay of Mandate pending  
U.S. Supreme Court review" re:

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

x

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

AMERICAN GERI-CARE, INC.

Respondent.

x

Brief statement of the relief requested:

Stay of Mandate pending Supreme Court review.

Previous requests for similar relief and disposition:

None

Statement of the issue(s) presented by this motion:

Whether this Court should stay its mandate in this matter pending review by the U.S. Supreme Court.

Brief statement of the facts (with page references to the moving papers):

This Court has granted enforcement of the Board's Petition and Order. A Petition for Rehearing was denied on January 23, 1983. The mandate will, therefore, issue on January 30, 1983. This Motion is made for a Stay

of Mandate.

Summary of the argument (with page references to the moving papers):

1. An important issue of law, similar to one presently pending before the U.S. Supreme Court, is involved in this proceeding (Paragraph 2 annexed Affidavit) i.e., whether the burden of proof shifts, in a "mixed motive" discharge, to the Employer.

2. No prejudice exists to the grant of the Motion because a) the employee discharged does not desire reinstatement having refused three offers of it and b) the next election ordered by the Board has already taken place (Paragraph 3 et seq of Affidavit.)

January 24, 1983

Date

MORRIS TUCHMAN

Attorney for Respondent

ORDER

IT IS HEREBY ORDERED that the motion be,  
and is hereby granted Mandate is stayed  
until March 1, 1983.

/s/

Henry J. Friendly, U.S.C.J.

/s/

Thomas J. Meskill, U.S.C.J.

2/16/83

Date

/s/

Richard J. Cardamone (by TJM)  
U.S.C.J.

FJZ

258 NLRB No. 147

D--8206  
Brooklyn, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR  
RELATIONS BOARD

Cases 29-CA--7629 and  
29--RC--4765

AMERICAN GERI-CARE, INC.

and

LOCAL 114, HOTEL, HOSPITAL,  
NURSING HOME AND ALLIED  
HEALTH SERVICES UNION,  
SERVICE EMPLOYEES  
INTERNATIONAL UNION,  
AFL--CIO

Case 29--CA--7679

and

LOCAL 6, INTERNATIONAL  
FEDERATION OF HEALTH  
PROFESSIONALS, INTERNATIONAL  
LONGSHOREMEN'S ASSOCIATION,  
AFL--CIO

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

On June 15, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the Charging Party filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings<sup>1</sup>, and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order<sup>3</sup>, as modified herein.<sup>4</sup> We shall direct that a second election be held.

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**Footnotes**

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), eno 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We note, however, that the correct spelling of the alleged discriminatee's name is Shirley Annenburn.

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Footnotes (continued)

The Administrative Law Judge found, at sec. IV,A,4, par. 1 of his Decision, that Assistant Director of Nursing Wilson gave Annenburn permission to leave the Home, on November 20. This is incorrect. It was Assistant Director of Nursing Palma who gave Annenburn permission to leave the Home on that date. The Administrative Law Judge also found, at sec. IV,B,2 par. 3 of his Decision, that employee Charles testified that Director of Nursing Services Milano had promised the employees a good "package deal" if they voted for management. Charles actually testified that Milano had promised employees a good "contract" if they voted for management. This discrepancy does not detract from our agreement with the Administrative Law Judge's legal conclusions on the issue.

- 2 In arguing that Annenburn was lawfully discharged, Respondent alleges that Assistant Director of Nursing Palma was also discharged for the same incident. The discharge of Palma in no way affects our finding that Annenburn was unlawfully discharged.

Because Respondent's asserted lawful reason for the discharge of

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Footnotes (continued)

Shirley Annenburn is pretextual, as the Administrative Law Judge found, Member Jenkins considers the Administrative Law Judge's reliance on Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980) to be unnecessary, though it does not invalidate his conclusion.

- 3 Member Jenkins would award interest on the backpay due in accordance with his dissent in Olympic Medical Corporation, 250 NLRB 146 (1980).
- 4 We have modified the Administrative Law Judge's recommended Order to include a provision that all pertinent records be made available to the Board for the purpose of computing backpay. We have also modified the Administrative Law Judge's proposed notice to conform with his recommended Order.

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## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, American Geri-Care, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraph accordingly:

"(c) Preserve and, upon request, make available to the Board or its

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agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

2. Substitute the attached notice for that of the Administrative Law Judge.

#### DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 29 shall direct and supervise the election, subject to the National Labor

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Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who

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have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>5</sup>

<sup>5</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underware Inc., 156 NLRB 1236 (1966); N.L.P.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names

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Footnotes (continued)

and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 29, within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL--CIO, or Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL--CIO, or neither Union.

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Dated, Washington, D.C. September  
30, 1981

/s/  
John H. Fanning, Member

/s/  
Howard Jenkins, Jr., Member

/s/  
Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States  
Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization  
To form, join, or assist any  
union

To bargain collectively  
through representatives of their  
own choice

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To engage in activities together for the purpose of collective bargaining or other mutual aid or protection.

To refrain from the exercise of any or all such activities.

WE WILL NOT harass or discharge you for engaging in union activities.

WE WILL NOT promise or grant you benefits to induce you to vote against a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the National Labor Relations Act, as amended.

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WE WILL offer Shirley Annenburn full and immediate reinstatement to her former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, plus interest.

AMERICAN GERI-CARE, INC.  
(Employer)

Dated \_\_\_\_\_ by \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11241, Telephone 212-330-7709.

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Brooklyn, NY

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
NEW YORK, NEW YORK

Case Nos. 29-CA-7629  
29-CA-7679  
29-RC-4765

AMERICAN GERI-CARE, INC.

and

LOCAL 144, HOTEL, HOSPITAL,  
NURSING HOME AND ALLIED HEALTH  
SERVICES UNION, SEIU, AFL-CIO

and

LOCAL 6, INTERNATIONAL FEDERATION  
OF HEALTH PROFESSIONALS, INTERNATIONAL  
LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Bert A. Bunyan, Esq.,  
Brooklyn, NY, for the  
General Counsel.

Morris Tuchman, Esq.,  
(Gluck & Tuchman)  
New York, NY, for the  
Respondent.

Daniel Engelstein, Esq.,  
(Vladeck, Elias, Vladeck &  
Englehard), New York, NY  
William Perry, New York, NY  
for Local 6.

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DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law

Judge: This case was heard before me in New York City on October 16, 28 and 29, November 25 and 26, December 10 and 17, 1980 and January 7, 8 and 12, 1981. Charges were filed by Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO ("Local 144") on November 28, 1979 and by Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO ("Local 6") on January 4, 1980. Complaints were issued on January 10 and February 29, 1980 alleging that American Geri-Care, Inc., ("Respondent") violated

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Section 8(A)(1), (2), (3) and (4) of the National Labor Relations Act, as amended (the "Act"). Respondent filed answers denying the commission of the alleged unfair labor practices.

On October 29, 1979 1/ Local 144 filed a representation petition in a unit of registered nurses employed by Respondent. On November 15 the parties entered into a Stipulation for Certification Upon Consent Election. Approximately thirteen eligible voters, nine valid ballots were cast, one of which was challenged. Of the eight valid votes counted, five were cast against the participating labor organizations,

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1/ All dates refer to 1979 unless otherwise specified.

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three were case for Local 144 and none were case for Local 6.

On December 28 Local 144 filed timely objections to the election. On April 28, 1980 the Regional Director for Region 29 issued a Report On Objections and Order Consolidating Cases and Notice of Hearing. With respect to the objections to the conduct of the election, the Regional Director recommended that Objections 2, 5 and 6 be overruled and that a hearing be held on the issues raised by Objections 1, 3 and 4 and the allegations in the complaints in Case Nos. 29-CA-7629 and 29-CA-7679. The cases were consolidated for the purpose of hearing, ruling and decision by an Administrative Law Judge.

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The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by counsel for Respondent and counsel for Local 144.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

#### Findings of Fact

##### I. The Business of Respondent

Respondent, a New York Corporation, with its principal office and place of business in Brooklyn, New York, provides health care, staffing and related services. During the twelve months preceding the issuance of the complaint, Respondent performed services valued in

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excess of \$50,000 for various nursing homes, including the Aischel Avraham Nursing Home, which has an annual gross revenue in excess of \$100,000. Respondent admits that it is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and I so find.

## II. The Labor Organizations Involved

Local 144 and local 6 are labor organizations within the meaning of Section 2(5) of the Act.

## III. The Issues

The complaint in Case No. 29-CA-7629 alleges that Respondent violated the Act by harassing, discharging and failing to reinstate an employee for her union activities and by soliciting employees to join Local 6.

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The complaint in Case No. 29-CA-7679 alleges that Respondent violated the Act by directing its employees to vote against both Local 6 and Local 144 and by promising benefits the day before the election was to take place. Pursuant to the Report on Objections to the election, I am to decide whether unlawful promises of benefits were made by Respondent during the period between the filing of the petition and the date of the election and whether in the 24-hour period prior to the election Respondent directed the employees not to vote for the unions and conferred upon them an unlawful benefit. The issues, accordingly, are:

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1. Did Respondent harass, discharge and fail to reinstate one of its employees for her union activities;

2. Was this employee a supervisor;

3. Did Respondent solicit employees to join Local 6;

4. Did Respondent unlawfully promise benefits to its employees; and

5. Did Respondent hold a meeting in the 24-hour period prior to the election at which time it instructed employees to vote against the unions and at which time it conferred an unlawful benefit.

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IV. The Facts

A. Case No. 29-CA-7629

1. Background

On October 29 Local 144 filed a representation petition in Case No. 29-RC-4765 for a unit of registered nurses employed by Respondent at Aischel Avraham Nursing Home in Brooklyn, New York (the "Home"). On November 15 Respondent, Local 144, and Local 6 executed a Stipulation for Certification Upon Consent Election. On the same day Shirley Annenburn, a registered nurse at the Home, was subpoenaed to appear at the Board's offices in Region 29 on behalf of Local 144 at a representation hearing in Case No., 29-RC-4765. On November 16 Annenburn was handed a warning slip for

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latenesses occurring during the period from September 8 through November 3. On November 17 Annenburn's request for leave, which had been submitted a month earlier, was rejected. On November 20 Annenburn's request for a half-day off was denied and on November 21 Annenburn was discharged.

Approximately two weeks prior to the election Evelyn Milano, Director of Nursing Services for Respondent, held a meeting with approximately eight of the registered nurses. At this time Milano told the employees that they should vote for management. The election took place on December 20 at which time five votes were cast against the participating labor organizations and three votes were cast for Local 144.

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## 2. Supervisory Status of Annenburn

Shirley Annenburn was employed at the Home from July 18 until November 21 as a Charge nurse on the third floor of the home. She was supervised by Elsa Wilson, Assistant Director of Nursing. She worked the morning shift from 7:00 a.m. until 3:30 p.m. and had under her a licensed practical nurse and five or six aides. Annenburn credibly testified that she assigned work to the employees on her floor but she did not hire, fire, promote, transfer or recommend the suspension or transfer of any employees. She testified that her duties and responsibilities were the same as the other registered nurses at the Home. Yasmin Damji, also a Charge Nurse of

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the Home, similarly testified with respect to her duties. She credibly testified that she did not have authority to hire, fire or suspend employees. She testified that as part of her professional responsibilities she directed the aides and orderlies on her floor. She further credibly testified that if one of the employees would come to her with a problem she would send that employee to her supervisor. Evelyn Milano, Director of Nursing Services, testified that all registered nurses and the authority to reprimand employees and to issue warning slips. However, Juanita Palma, Assistant Director of Nursing, credibly testified that before a Charge Nurse gave a warning slip she

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had to inform her supervisor, and that she did not know of any registered nurses having given anyone a warning slip. Elsa Wilson, Assistant Director of Nursing since May 1980, testified that Annenburn was not a supervisor and Gary Stern, a corporate officer of Respondent, testified that the only supervisors were the Director and Assistant Director of Nursing and the In-Service Coordinator.

### 3. Harassment of Annenburn

Paragraph Ten of the complaint in Case No. 29-CA-7629 alleges that during the period from November 16 through November 20 Respondent harassed Annenburn by issuing a written warning to her; by denying her vacation; by

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requiring her to submit a doctor's note for being absent; by denying her time off; and by engaging in increased surveillance of her work.

Annenburn testified that in October 1979 she signed an authorization card for Local 144 and attended a meeting conducted by Local 144. She also testified that she spoke with several employees of Respondent concerning Local 144. Palma, who impressed me as being a particularly credible witness, testified that around November 7 Milano told her that Annenburn had attended a union meeting. Palma further testified:

Q. Ms. Palma, do you recall any other conversations that you had with Ms. Milano with respect to Mrs. Annenburn?

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A. Yes, Ms. Milano said that if they...put a two-union in the building, she would have to leave, she told us, she told us in front of the supervisors.

As previously stated, on November 15 Annenburn was subpoenaed to appear at Region 29 on behalf of Local 144 at a representation hearing in Case No. 29-RC-4765. Annenburn testified that Stern and Milano were also present at the hearing. Stern corroborated this testimony.

(a) Written Warning

The complaint in Case No. 29-CA-7629 alleges that one of the ways in which Respondent harassed Annenburn was by issuing a written warning to her during the period immediately following her appearance at a Board hearing. Annenburn credibly testified that on November 16 Wilson handed her a warning

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slip for latenesses occurring during the period from September 8 through November 3. The majority of the latenesses occurred in October. Annenburn credibly testified that she had been given verbal permission for the latenesses and she further credibly testified that this was the first time that she was issued a written warning for being late.

I credit Annenburn's testimony and find that the warning slip was issued because of Annenburn's involvement with Local 144 and her appearance pursuant to subpoena at a hearing conducted by the National Labor Relations Board on November 15.

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(b) Denial of Vacation

On October 19 Annenburn requested two week's leave for purposes of her wedding, the leave to commence on December 29. On November 16, the day after receiving the warning slip with respect to the latenesses, Annenburn received a written rejection of her request for leave. Although Milano denied knowledge that Annenburn requested the leave for purposes of getting married, I credit Palma's testimony that around November 7 Milano told her that she knew Annenburn requested leave because she was getting married. Palma further credibly testified, as follows:

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Q. Were there any other conversations that you can recall having with Ms. Milano as it relates to Mrs. Annenburn?

A. Yes, it's about the time when Mrs. Annenburn was requesting the time off, I mean days off, I think.

Q. Do you recall what was said?

A. She said she was not going to give her the time off and she wants her out.

Although Annenburn requested time off as early as October 19, the denial came immediately on the heels of the warning slip, which was given the day after Annenburn's appearance at the Board hearing. I find that the refusal to grant the leave was another step in the harassment of Annenburn for her union related activities.

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(c) Refusal to Submit Doctor's Note  
and Denial of Half-Day Off

The complaint further alleges that Respondent harassed Annenburn by requiring that she submit a doctor's note after being absent one day because of illness and by denying her request for a half-day off. Annenburn testified that she was ill on November 18 and was off-duty on November 19. On November 20, when she appeared for work, she was asked to submit a doctor's note. Respondent's Exhibit 6 clearly states that anyone who is ill a day prior to a day off must submit a note from a physician before restarting duty. I find that with respect to the request for a doctor's note, General Counsel has not sustained its burden of showing that

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such request was made to harass Annenburn because of her union activities.

At the beginning of the shift on November 20 Annenburn testified that she asked for a half-day off. Milano testified that Annenburn asked to leave at 12:00 o'clock that day at which point Milano stated, "its very short notice, I can't possibly get someone to replace you now."

Based on the testimony, I find that General Counsel has not sustained its burden of showing that the denial of the half-day off as a part of Respondent's harassment of Annenburn for her union activities.

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(d) Surveillance of Annenburn's Work

The complaint alleges that subsequent to November 16 Rabbi Wurtzberger, the Home chaplain, engaged in increased surveillance of Annenburn's work. Annenburn testified that subsequent to November 16 Rabbi Wurtzberger was "just continuously on my heels all the time, always around -- like I said, if I'm in the elevator, he's there. If I'm in the coffee shop -- wherever I am the rabbi is there." No one substantiated Annenburn's allegation of surveillance. In uncontroverted testimony Stern stated that Rabbi Wurtzberger was not an employee of Respondent nor was he an agent of Respondent. This was corroborated by Milano. Based upon the

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testimony, General Counsel has not sustained its burden of showing that Rabbi Wurtzberger was an agent of Respondent nor that he engaged in surveillance of Annenburn's work.

#### 4. Discharge of Annenburn

Annenburn testified that on the morning of November 20, while she was doing her nursing duties on the third floor, she received a telephone call telling her that her mother had taken ill. Annenburn also testified that a call had been placed earlier that morning to the Home with the information that Annenburn's mother had taken ill. Annenburn then proceeded to the nursing office to find out why she had not received the prior call. Annenburn

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encountered Wilson in the elevator, on her way to the nursing office. After a short conversation Wilson gave Annenburn permission to leave, at which time Annenburn returned to the third floor, took her coat, punched out and went home. Later that evening, Annenburn received a telephone call from Milano who said that Annenburn would be required to bring a note from a physician stating that Annenburn's mother was hospitalized. Annenburn replied that her mother was a diabetic and had taken ill but was not hospitalized and that Annenburn would not be able to produce a note from a physician.

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Annenburn further testified that on November 21, when she came to work, her punch card was not in the usual place. When she got to the third floor she was told that she was wanted in the nursing office. Annenburn then met with Stern, who after refusing to meet with her in the presence of another employee, told her "you may go home and don't come back."

Stern testified that Annenburn was discharged because "she abandoned a dying patient." The patient involved was Mrs. Serena Dimant, who was a patient on the third floor of the Home. Palma testified that on the morning of November 20 she was paged by Annenburn who stated that she would need help on

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the third floor because Mrs. Dimant was having difficulty breathing. When Palma arrived in the patient's room she observed Annenburn checking the patient's vital signs. Palms asked Annenburn to get oxygen and administer it to the patient. Palma testified that Annenburn administered the oxygen to the patient and while Annenburn was attending the patient, Palma went to call for an ambulance. Palma testified that Annenburn was performing her duties properly as they related to Mrs. Dimant. Palma further testified that Annenburn was an "efficient nurse" and "she brought the oxygen right away to

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the patient /a/nd she did what she ha/d/  
to do."2/

Annenburn credibly testified "from the time I began working, until one day after I came to the Labor Board, I had no problem from my supervisors. I had no complaints from them as to my job." She also credibly testified that she was commended by both Milano and the in-service instructor for the work she was performing on the third floor.

Annenburn and Palma's testimony was in large measure corroborated by the testimony of Wilson, Annenburn's supervisor and since May 1980, Assistant

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2/ As noted earlier, I found Palma a truthful witness and ,accordingly, I credit her testimony.

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Director of Nursing. Wilson testified that she observed Palma and Hacksaw, a licensed practical nurse, administering to Mrs. Dimant. Wilson testified that Annenburn was also on the floor at that time. She further testified that Palma gave Annenburn permission to leave the Home that day. In this regard Stern conceded that Palma had the authority to give permission to Annenburn to leave.

Both Milano and Stern testified that they were dissatisfied with Annenburn for leaving a sick patient and accordingly decided that she would be terminated. I regard this reason as clearly pretextual. The evidence is uncontroverted that one or two registered nurses, namely Palma and

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Wilson, and a licensed practical nurse, Hackshaw, were administering to Mrs. Dimant. In addition, I credit the testimony of Palma that Annenburn was taking proper care of the patient and administered oxygen to her when it became necessary. Furthermore, Milano conceded that both she and Stern knew, before they terminated Annenburn, that Palma had given permission to Annenburn to leave the Home.

I find that Annenburn gave proper care to the patient, Mrs. Dimant. She was then given permission by Palma, who had authority to give such permission, to leave the Home. Milano and Stern knew that she was given that permission before they terminated her. I find that

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Annenburn's termination was a culmination of events which started with the giving of the warning notice and then the refusal to approve the request for leave. These actions were taken by Respondent because of Annenburn's activity on behalf of Local 144 and because of her appearance at the Board hearing on November 15.

#### 5. Offer of Reinstatement

The complaint alleges that Respondent has failed to reinstate Annenburn to her former position of employment. respondent, on the other hand, claims that an offer of reinstatement was made. Respondent's Exhibit 3 is the confirmation copy of a telegram dated January 25, 1980,

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addressed to Annenburn which states, "You are hereby offered reinstatement at American Geri-Care, Inc. This position will be held open for you until Wednesday, January 30, 12 noon." Respondent's Exhibit 1 is the confirmation of a telegram dated January 30, 1980, again addressed to Annenburn, which states, "Having not heard from you regarding our offer of reinstatement at American Geri-Care, Inc., we wish to inform you that we are extending our offer of reinstatement until 12 noon, Friday, February 2." Annenburn testified that she received both of the telegrams, however, she believed that one of them was received after the deadline. She did not know which of the two telegrams

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was received after the deadline.

6. Solicitation of Employees  
to Join Local 6

The complaint in Case No. 29-CA-7629 alleges that during november and December Respondent solicited its employees to sign cards designating Local 6 as their representative for collective bargaining purposes and urged and solicited its employees to join Local 6. Wilson testified that she "mentioned to Mrs. Annenburn that a man from Local 6 was on the floor." She denied that she ever directed Mrs. Annenburn to sign a card for Local 6. She further testified that she did not have any conversations with Mrs.

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Annenburn with regard to Local 6. While on direct examination Annenburn testified that Wilson asked her to speak to a representative from Local 6 and to sign a card for Local 6, on cross-examination Annenburn conceded that Wilson simply told her "there is a man downstairs that represents Local 6." Annenburn further testified on cross-examination that Wilson did not show her a card for Local 6, that she did not meet the Local 6 representative and that "he wasn't there on my time." Damji credibly testified that no one ever told her to vote for Local 6 and Palma credibly testified that she did not know of anyone being asked to sign a card for Local 6. Other than Annenburn's

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testimony on direct examination, which was modified on cross-examination, there was no testimony that the employees were urged or solicited to vote for Local 6. Accordingly, General Counsel has not sustained its burden of proving this allegation and the allegation is therefore dismissed.

B. Case No. 29-CA-7679

1. Direction to Vote Against the Unions

Paragraph 9 of the complaint in Case No. 29-CA-7679 alleges that on or about December 19 Milano directed the employees to vote against both Local 6 and Local 144 and "particularly to vote against Local 6." William Perry, president of Local 6, testified that he

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overheard a conversation between Milano and four or five nurses "to vote against the union: but if you have to vote, you and your co-workers, be sure do not vote or something like that, do not place your mark in the box that would reflect a vote for Local 6." When questioned as to the date of the meeting, Perry testified "It could have been the eighteenth, it could have been the nineteenth, it could have been the seventeenth." When asked to describe the people who were at the meeting, Perry testified:

A. I think maybe one was a man, or two, I'm not sure now.

Q. You're not sure?

A. Yeah, and there was women there t/o/o. It was a year ago. I got fifteen other cases on my mind already.

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Damji testified that approximately two weeks before Christmas, Milano had a meeting with herself, Mrs. Charles and Mrs. Vargas, at which time Milano told them that she would like them to vote for management. Charles testified concerning the meeting at which Damji was present, and stated that there was only one such meeting. 3/ She testified that Milano stated "the Company has a good package deal for the RN's and that she couldn't say

3/ While Charles testified that the meeting took place on December 19, she also testified that Damji was present at the meeting and there was only one such meeting. I credit Damji's testimony that this meeting took place two weeks before Christmas and conclude that Charles was mistaken about the date. In this regard, Respondent's motion to strike Charles' testimony is denied.

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specifically because that was illegal." She further testified that Milano showed them a sample ballot similar to General Counsel Exhibit 5 but that no "X" was placed in any of the boxes. In addition, Charles testified that she did not recall Perry's presence at the meeting. Milano testified that there was a meeting between herself and the registered nurses "a couple of weeks before the election." She testified that Damji and Charles attended the meeting, at which time she told the nurses "that management had been fair to them and that I felt that they should vote for management." She further testified that she did not speak to an assembled group of registered nurses on December 19.

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I credit Damji's and Milano's testimony that the meeting took place several weeks prior to the election. In his testimony, Perry was very uncertain as to the precise events. He thought that the day of the meeting may have been December 17, 18 or 19 and he couldn't recall who was at the meeting. His remarks were "it was a year ago. I got fifteen further evidenced by his testimony that General Counsel Exhibit 5 was handed out at that meeting. That exhibit shows an "X" in the box marked Local 144. I credit Charles' testimony, however, that the sample ballot which was handed out contained no "X" in any of the boxes.

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In view of Perry's testimony that he was standing approximately 10 to 15 feet away from the group, and that Milano's back was towards him, I believe that he was mistaken as to some of the events as to which he testified. The evidence does not sustain the allegation that the meeting took place on December 19. In addition, no witness other than Perry testified that Milano told the nurses to vote against the unions and "particularly to vote against Local 6." Accordingly, General Counsel has not sustained its burden of proof and the allegation is dismissed.

## 2. Promise of Benefits

Paragraph 10 of the complaint in Case No. 29-CA-7679 alleges that on or

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about December 19 Respondent promised, and on or about January, 3, 1980 Respondent granted, wage increases and other benefits to its employees, to induce them to vote against the unions. The parties stipulated that the registered nurses received a wage increase and an additional week's vacation, effective January 1, 1980.

Damji testified that at the meeting held two weeks before Christmas Milano told the nurses to vote for management. She further testified that Milano said "the nursing home is already negotiating pay raises and benefits that the employees were asking for, and that the employees should vote for management." Charles testified that Milano said the following at the meeting:

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A. Yes, we were also told if we should vote for Administration that's when we would have the good contract. It would be showed to us the day after the election, as long as Administration wins the election.

Q. Did there come a time after that meeting when there was a change in your salary?

A. Yes, we get a raise of pay.

Q. Do you recall when you received such a raise?

A. Maybe a month later.

As stated above, I have found that the meeting took place not on December 19, but approximately ten days to two weeks previously. I credit Charles' testimony that Milano said that if the employees voted for management they would get a good contract and that "the company had a good package deal for the

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RN's." I find that this constituted an unlawful promise of benefits and that effective January 1, 1980 the employees were granted a wage increase and were given an additional week's vacation.

C. Objections to the Election

Objection 1 to the election alleges that during the period between the filing of the petition and the date of the election, Respondent attempted to induce its employees to abandon their support of Local 144 by making unlawful promises of benefits. As discussed above, I have found that approximately 10 days prior to the election Respondent made an unlawful promise of benefits.

Objections 3 and 4 allege that during the 24-hour period prior to the

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election, Respondent held a meeting of its employees at which time it attempted to induce them to abandon their support of Local 144 and also conferred upon them an unlawful benefit. As I found above, the record does not sustain the allegation that such a meeting took place during the 24-hour period prior to the election.

#### V. Discussion and Conclusions

##### A. Supervisory Status of Annenburn

Respondent and Local 6 contend that Annenburn's duties as Charge Nurse were such as to require a finding that Annenburn was a "supervisor" within the meaning of Section 2(11) of the Act.

Based on the testimony, detailed above, I find that the duties and

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responsibilities of Annenburn, As Charge Nurse, were the same as the other registered nurses as the Home. As part of her professional responsibilities, Annenburn directed the aides and orderlies on her floor. She did not have authority to hire, fire or suspend employees.

As the Board stated in Meharry Medical College, 219 NLRB 488, 490 (1975):

/I/t appears that charge nurses do not exercise any real supervisory authority on behalf of management over employees. Rather, their duties are for the most part routine, involving the general direction of employees in the performance of their normal patient care duties and, as such, the charge nurses function more in the nature of lead persons.

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Even assuming that charge nurses may exercise some supervisory authority, the fact that they may do so only for a short period of time and on a sporadic basis would not require their exclusion from the unit. Accordingly, based on the evidence discussed above, we find that charge nurses are not supervisors....

Under Board cases, Annenburn's duties as Charge Nurse do not bring her into the category of "supervisor." See Wing Memorial Hospital Association, 217 NLRB 1015 (1975); Eventide South, A Division of Geriatrics, Inc., 239 NLRB 287 (1978). Indeed, Milano conceded that Annenburn was not a supervisor and Stern testified that the only supervisors were the Director and Assistant Director of Nursing and the In-Service Coordinator. Accordingly, I conclude that Annenburn was not a "supervisor" within the meaning of Section 2(11) of the Act.

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B. Harassment and Discharge of Annenburn

As detailed above, in October Annenburn signed an authorization card for Local 144 and attended a meeting conducted by Local 144. On November 15 she was subpoenaed to appear at a Board representation hearing on behalf of Local 144. I find that the warning issued to her on November 16 and the denial of vacation on November 17 were steps taken by Respondent because of Annenburn's activities on behalf of Local 144 and because of her attendance at the representation hearing. These acts by Respondent constitute violations

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of Section 8(a)(1) and (4) of the Act.

With respect to Respondent's discharge of Annenburn, Respondent clearly knew of Annenburn's union activity. On November 7 Milano told Palma that Annenburn had attended a union meeting. In addition, Stern and Milano were present at the representation hearing at which Annenburn appeared pursuant to subpoena. Also, Respondent's animus towards Local 144 has been demonstrated. I have credited Palma's testimony that Milano said "if they put...two-union S in the building, she would have to leave." Finally, the discharge occurring within a few days of Annenburn's appearance at the Board hearing, and upon the heels of the

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warning and the denial of vacation, General Counsel has made a prima facie showing to support the inference that protected activity was a motivating factor in Respondent's decision to discharge. See Wright Line, Inc., 241 NLRB No. 150 (1980).

As noted above, I regard Respondent's contention that Annenburn was terminated for leaving a sick patient as mere pretext. Clearly, therefore, Respondent has not shown that the "same action would have taken place even in the absence of the protected conduct." See Limestone Apparel Corp., 255 NLRB NO. 101 (1981). Accordingly, I conclude that Respondent, by its discharge of Annenburn, violated Section

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8(a) (1), (3) and (4) of the Act.

C. Offer of Reinstatement

The record contains confirmation copies of two telegrams sent by Respondent to Annenburn, offering reinstatement. Annenburn testified that she believed one of the telegrams was received after the deadline stated in the telegram. She did not know which of the two telegrams was received after the deadline.

An offer of reinstatement may be effective if it was made in good faith and in a manner in which it could reasonably be anticipated that the employee would receive timely notice of the offer. See Knickerbocker Plastic Co., Inc., 132 NLRB 1209, 1236 (1961).

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While Annenburn testified that she received one of the telegrams after the deadline, and the other shortly before the deadline, the record does not contain any details concerning the circumstances surrounding the alleged delay in Annenburn receiving notification of the telegrams. Because the matter has not been fully litigated, I am unable to decide whether Respondent's offer tolled its backpay liability and satisfied its reinstatement obligation. In accordance with Board precedent, the resolution of this should be left to the compliance stage of the proceeding. See Airport Service Lines, Ind., 218 NLRB 1160, 1161 (1975).

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D. Promise and Grant of Benefits

Section 8(a)(1) f the Act proscribes an employer's promise of benefits to its employees to influence them to refrain from supporting a union. N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964). The promise of benefits need not be explicit to violate the Act. the Board has held an implied promise of benefits also violates Section 8(A)(1). See Servomation, Inc., 237 NLRB 48, 52 (1978), enfd. 603 F.2d 762 (9th Cir. 1979).

In Arrow Molded Plastics, Inc., 243 NLRB NO. 181 (1979), the Board found a violation of Section 8(a)(1) for an implied promise of benefits. The employer's representative stated "our

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policy is to pay equal or greater than what is being paid in our area for similar work by similar companies." In addition, the employer's representative testified that he informed employees that he "hoped to prepare recommendations ... but had received legal advice not to do so because it might be considered an implied promise of benefit ... that would be an unfair labor practice ...."

I have credited Charles' testimony that milano told the employees "the company had a good package deal for the RN's and that she couldn't say specifically because it was illegal." This testimony is strikingly similar to that in Arrow, supra, where the Board

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found a violation of Section 8(a)(1).

Accordingly, I conclude that Respondent unlawfully promised benefits to its employees in violation of Section 8(a)(1). In addition, the subsequent grant of benefits, soon after the election took place, also violated Section 8(a)(1). See Stride-Rite Corp., 228 NLRB 224 (1977).

E. Objections to the Election

As indicated above, I have found that the record does not sustain the allegation that Respondent held a meeting of its employees during the 24-hour period prior to the election. Accordingly, Objections 3 and 4 are overruled.

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Objection 1 alleges that Respondent attempted to induce its employees to abandon their support of Local 144 by making an unlawful promise of benefits. I have found that during the pre-election period Respondent promised benefits in violation of Section 8(a)(1). This, a fortiori, is a ground for setting aside the election. See Dal-Tex Optical Company, Inc., 137 NLRB 1782 (1962); Derby Refining Company, NLRB 12, 17 (1978).

In addition, I have found that Respondent engaged in unfair labor practices through its harassment and discharge of Annenburn for her union related activities. As the Board stated in Dal-Tex, supra, 137 NLRB at 1786,

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"c/onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election." See also Highview, Inc., 231 NLRB 1251, 1259 (1977).

Accordingly, I conclude that Respondent, by its conduct, interfered with the "laboratory conditions" required for a free election. Such conduct mandates that the election be set aside,

#### Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 144 and Local 6 are labor organizations within the meaning of

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Section 2(5) of the Act.

3. By issuing a warning slip and denying a request for leave to Shirley Annenburn because of her union related activities and because of her appearance at a representation hearing, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

4. By discharging Annenburn for her union related activities and because of her appearance at a representation hearing, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1), (3) and (4) of the Act.

5. By promising and granting employees benefits to induce them to

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refrain from supporting Local 144 and Local 6, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other manner alleged in the complaint.

#### The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed

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to effectuate the policies of the Act.

Respondent having discharged Shirley Annenburn in violation of the Act, I find it necessary to order Respondent to offer her full reinstatement to her former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings that she may have suffered from the time of her termination to the date of Respondent's offer of reinstatement.

Backpay shall be computed in accordance with the formula approved in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest computed in the manner

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prescribed in Florida Steel Corp., 231  
NLRB 651 (1977). 4/

Upon the foregoing findings of fact  
and conclusions of law, and upon the  
entire record, and pursuant to Section  
10(c) of the Act, I hereby issue the  
following recommendation: 5/

ORDER

Respondent, American Geri-Care,  
Inc., its officers, agents, successors  
and assigns, shall:

4/ See generally, Isis Plumbing &  
Heating Co., 138 NLRB 716, 717-721  
(1962).

5/ In the event no exceptions are filed  
as provided in Section 102.46 of the  
Rules and Regulations of the National  
Labor Relations Board, the findings,  
conclusions, and recommended Order  
herein shall, as provided in Section  
102.48 of the Rules and Regulations,  
be adopted by the Board and become  
its findings, conclusions, and Order,  
and all objections thereto shall be  
deemed waived for all purposes.

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1. Cease and desist from:

(a) Harassing and discharging employees for activities protected by Section 7 of the Act.

(b) Promising and granting benefits to employees to induce them to vote against a union.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Shirley Annenburn immediate and full reinstatement to her former position, or if such position no longer exists, to a substantially

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equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings, in the manner set forth in the section above entitled "The Remedy".

(b) Post at its facility in Brooklyn, New York copies of the attached notice marked "Appendix." 6/ Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be

6/ In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days of the date of this Order, what steps the Respondent has taken to comply herewith.

IT IF FURTHER ORDERED that the election held on December 20, 1979 in Case No. 29-RC-4765 is hereby set aside

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and said case is hereby remanded to the Regional Director for Region 29 for the purpose of conducting a new election.

IT IS FURTHER ORDERED that those allegations of the complaints as to which no violations have been found are hereby dismissed.

Dated: Washington, D.C. June 15, 1981.

/s/  
D. Barry Morris  
Administrative Law Judge

**APR 6 1983**

ALEXANDER L. STEVAS,  
CLERK

No. 82-1456

**In the Supreme Court of the United States**

OCTOBER TERM, 1982

AMERICAN GERI-CARE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD IN OPPOSITION**

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*National Labor Relations Board  
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### **QUESTION PRESENTED**

**Whether substantial evidence supports the Board's finding that petitioner discharged an employee because of her union activities and her attendance at a Board meeting.**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 697 F.2d 56. The decision and order of the National Labor Relations Board (Pet. App. A29-A43) and the decision of the administrative law judge (Pet. App. A44-A105) are reported at 258 N.L.R.B. 1116.

## **JURISDICTION**

The judgment of the court of appeals was entered on December 23, 1982, and a petition for rehearing was denied on January 21, 1983 (Pet. App. A23-A24). The petition for a writ of certiorari was filed on March 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Petitioner is a New York corporation engaged primarily in providing health care, staffing and related services to medical institutions in the greater New York City area. At all times relevant to this case, petitioner was under contract to manage the nursing and dietary departments of the Aischel Avraham Nursing Home in Brooklyn, New York ("the Home"). During the fall of 1979,<sup>1</sup> two rival unions, Local 144<sup>2</sup> and Local 6,<sup>3</sup> launched campaigns to organize petitioner's 13 registered nurses who work at the Home (Pet. App. A3-A4, A46-A49).

Petitioner, who opposed the organizing efforts, became aware that employee Shirley Anenburn was an active supporter of Local 144 (Pet. App. A89). Thus, on November 7, 1979, Director of Nursing Services Evelyn Milano informed her assistant, Juanita Palma, that Anenburn had attended a Local 144 meeting (Pet. App. A57, A89). At approximately the same time, Milano also told Palma that she did not intend to grant a request for leave that Anenburn had filed in October and that she "want[ed Anenburn] out" (Pet. App. A61).

On November 15 an NLRB hearing was scheduled to consider Local 144's representation petition. Anenburn, who had been subpoenaed to testify on behalf of Local 144, attended the hearing and was seen there by Milano and Company Secretary Stern. Stern was aware that Anenburn was present as a witness for Local 144 (Pet. App. A5 n.5, A52, A58).

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<sup>1</sup>All dates refer to 1979 unless otherwise indicated.

<sup>2</sup>Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO.

<sup>3</sup>Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO.

On November 16, the day after the representation hearing, Anenburn received a written warning citing 12 instances of "tardiness" that allegedly occurred between September 8 and November 3. Most of the alleged instances had been excused (Pet. App. A53, A59). On the following day, Milano gave Anenburn formal notice that Anenburn's October 19 request for two weeks' personal leave would not be granted (Pet. App. A53, A60-A61). Four days later, on November 21, petitioner terminated Anenburn allegedly on account of an incident that occurred on November 20 involving patient Serena Dimant.

When Dimant became ill on the morning of November 20, Anenburn promptly paged Assistant Director of Nursing Palma and told her that she needed assistance on the third floor because Dimant was having trouble breathing. When Palma arrived on the third floor, she observed Anenburn following established nursing procedures and checking Dimant's vital signs. Anenburn continued to attend to Dimant while Palma made arrangements for an ambulance to take Dimant to a hospital (Pet. App. A11, A67-A71).

Later that morning Anenburn received a telephone call from a neighbor who informed Anenburn that her mother had suddenly become ill. Anenburn was also told that a similar message had been left for her earlier that morning. Upset that her mother was ill and that she had not received the earlier message, Anenburn decided to go to the nursing office on the first floor to find out why she had missed the previous call. At the time Anenburn left the third floor, nursing supervisor Wilson and licensed practical nurse Hackshaw were present on the floor. On her way to the nursing office, Anenburn met Palma in the elevator. Seeing that Anenburn was distraught and learning that Anenburn's mother was ill, Palma gave Anenburn permission to

leave for the day. Shortly thereafter, Anenburn punched out and went home (Pet. App. A12, A32 n.1, A65-A66, A69-A71).

Later that evening, Milano telephoned Anenburn at her home and told her that she was required to bring a note from a physician stating that her mother was hospitalized. Anenburn explained to Milano that her mother was diabetic and hypertensive, and that when she arrived home that day she found that her mother's condition did not require hospitalization or a doctor's attention. Consequently, she explained, she would not be able to obtain the doctor's note (Pet. App. A12, A66). The following day, Anenburn was summoned to meet with Milano and Company Secretary Stern. When Stern denied Anenburn's request that another employee be present during the interview and Anenburn said that she did not want to meet with Milano and Stern alone, Stern discharged Anenburn (Pet. App. A12-A13, A67). Prior to her union activity, Anenburn had an exemplary work record and had been complimented for her work performance on several occasions by, among others, Milano (Pet. App. A8, A69).

Approximately two weeks prior to the December 20 representation election, Milano met with a group of registered nurses, urged them to vote for management, and promised them a "good contract" if they voted for petitioner (Pet App. A53, A82-A84). In the December 20 election, the majority of unit employees voted against union representation, with five ballots cast against the participating unions, three for Local 144 and none for Local 6 (Pet. App. A46-A47, A53). On January 1, 1980, the Company granted the nurses an across-the-board wage increase and an additional week's vacation (Pet. App. A82).

2. The Board, adopting the decision of the administrative law judge, held that petitioner violated Section 8(a)(3), (4) and (1) of the Act, 29 U.S.C. 158(a)(3), (4) and (1), by

discharging employee Anenburn because of “her union related activities and because of her appearance at a representation hearing” (Pet. App. A98). In finding that Anenburn’s discharge was unlawful, the ALJ relied on petitioner’s animus towards Local 144, the timing of the discharge, which occurred “within a few days of Anenburn’s appearance at the Board hearing,” and the other instances of unlawful harassment in which the Company engaged in retaliation for Anenburn’s union-related activities (Pet. App. A88-A90).<sup>4</sup> The ALJ further found that petitioner’s proffered explanation for the discharge — Anenburn’s alleged abandonment of a sick patient — was pretextual (Pet. App. A70, A90). In so finding, the ALJ noted that at the time Anenburn left the floor Dimant was being attended to by one or two registered nurses as well as by a licensed practical nurse, that Anenburn had provided proper nursing care to Dimant, and that management officials were aware that Anenburn had received permission to leave from Assistant Director of Nursing Palma (Pet. App. A70-A72). The Board ordered petitioner to reinstate Anenburn with backpay (Pet. App. A100).

3. The court of appeals upheld the Board’s decision and enforced its order (Pet. App. A1-A22). It rejected petitioner’s contention that “Anenburn [had] abandoned a dying patient” (Pet. App. A14), specifically noting (Pet. App. A16) that there was “substantial evidence to support the

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<sup>4</sup>The Board, upheld by the court of appeals, found that petitioner had violated Section 8(a)(4) and (1) of the Act by issuing a warning slip to Anenburn and denying her request for leave because of her union-related activities, including her appearance at a representation hearing. Pet. App. A8-A11, A88-A89, A98. In addition, the Board, again affirmed by the court of appeals, found that petitioner had violated Section 8(a)(1) of the Act by promising and granting employees benefits to induce them to refrain from supporting either of the unions (Pet. App. A19-A22, A93-A95, A98-A99). Petitioner does not contest these findings (Pet. 4 n.3).

Board's finding that management's explanation for Anenburn's discharge was clearly pretextual." The court declined to consider petitioner's contention, repeated here, that the Board's *Wright Line* decision (see *infra*, pages 6-7) impermissibly shifted the burden of proof to petitioner, concluding (Pet. App. A16-A17) that the burden shifting rule formulated in *Wright Line* is applicable only to dual motive,<sup>5</sup> not to pretext, cases.<sup>6</sup>

### ARGUMENT

Petitioner contends that this case involves an application of the test articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), concerning allocation of the burden of proof in "dual motive" cases. Because the propriety of the Board's *Wright Line* test is under review in *NLRB v. Transportation Management Corp.*, cert. granted, No. 82-168 (Nov. 15, 1982), petitioner urges that review is appropriate here as well. However, unlike *Transportation Management*, this is not a dual motive case. Rather, the issue involved here is simply whether substantial evidence supports the Board's finding that petitioner's proffered ground for discharging employee Anenburn was pretextual, and that, consequently, she was discharged solely because of her union-related activities. That issue does not warrant further review by this Court.

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<sup>5</sup>Dual motive cases are those in which a discharge or other disciplinary decision is motivated by both legitimate and unlawful considerations.

<sup>6</sup>In a subsequent dual motive case, the Second Circuit held that the burden-shifting aspect of the Board's *Wright Line* decision is contrary to the requirements of the Act. *NLRB v. New York University Medical Center*, No. 82-4137 (Jan. 21, 1983).

Under the Board's *Wright Line* test, if the General Counsel has established that opposition to an employee's protected activities was "a motivating factor" in the employer's decision to discharge an employee, the employer can prevail only by showing by a preponderance of the evidence that it would have taken the same action "even in the absence of the protected conduct." *Wright Line*, *supra*, 251 N.L.R.B. at 1089 (footnote omitted). The First Circuit rejected the *Wright Line* test insofar as it places on an employer the burden of proving, rather than merely producing evidence, that it would have taken the same action for legitimate reasons. *NLRB v. Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899, 904-905 (1981), cert. denied, 455 U.S. 989 (1982). See also, *e.g.*, *NLRB v. New York University Medical Center*, No. 82-4137 (2d Cir. Jan. 21, 1983); *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), cert. granted, No. 82-168 (Nov. 15, 1982). Contra *NLRB v. Fixtures Mfg. Corp.*, 669 F.2d 547, 550 n.4 (8th Cir. 1982); *Zurn Industries, Inc. v. NLRB*, 680 F.2d 683, 686-693 (9th Cir. 1982), petition for cert. pending, No. 82-1166 (filed Jan. 6, 1983).

The burden-shifting aspect of the Board's test, which is at issue in *Transportation Management*, however, applies only to cases in which it has been shown that the employer had two motives, one lawful and one unlawful. As the Board explained at the outset of its decision in *Wright Line*, *supra*, 251 N.L.R.B. at 1084, if examination of the employer's evidence reveals that "the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon," no further analysis of motive is necessary, for it is apparent that animus toward the employee's concerted activities was the only reason for the discharge. In such a situation the burden-shifting aspect of the *Wright Line* test does not come into play. Indeed, although it rejected the burden-shifting aspect of the *Wright Line* test, the First

Circuit enforced the Board's order in *Wright Line* because it agreed that the alleged legitimate reason for the discharge in that case was a pretext. *NLRB v. Wright Line, supra*, 662 F.2d at 907 n.13 (1981).

Here, too, the Board found that the General Counsel had affirmatively established that the reason offered by petitioner for the discharge of Anenburn was pretextual, and the court of appeals agreed that that finding was supported by substantial evidence.<sup>7</sup> Accordingly, the only issue presented by the petition is whether the Board's finding of pretext is supported by substantial evidence, an issue that does not warrant review by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).<sup>8</sup>

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<sup>7</sup>Petitioner's contention that the ALJ analyzed the case as a dual motive discharge case and consequently impermissibly shifted the burden of proof is without merit. On several occasions (Pet. App. A70, A90) the ALJ expressly stated that he found petitioner's proffered explanation for Anenburn's discharge to be pretextual. Contrary to petitioner's assertion (Pet. 11), the ALJ's observation (Pet. App. A90) that "the 'same action would have taken place even in the absence of the protected conduct' " is no indication that he employed a dual motive analysis. Rather, when the phrase is read in context — "[a]s noted above, I regard [petitioner's] contention that Anenburn was terminated for leaving a sick patient as mere pretext. Clearly, therefore [petitioner] has not shown that the " 'same action would have taken place even in the absence of the protected conduct' " (Pet. App. A90) — it is apparent that the ALJ was simply noting that a finding of pretext conclusively undermined petitioner's claim that the discharge was for a legitimate reason. As noted above (*supra*, page 7), once it is established that an employer's reasons for a discharge are pretextual, it follows that issues concerning "the niceties of burdens of proof" do not arise. Pet. App. A18, quoting *NLRB v. Magnesium Casting Co.*, 668 F.2d 13, 16 (1st Cir. 1981).

<sup>8</sup>The Court recently declined to review a case in which the petitioner contended that the Board's finding that petitioner's asserted legitimate reason for discharge of two employees was pretextual involved an application of the burden-shifting aspect of the Board's *Wright Line* test. *Brewton Fashions, Inc. v. NLRB*, cert. denied, No. 82-1209 (Apr. 4, 1983).

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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